

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MELISSA ANN WRIGHT, court appointed)	
guardian of BROGAN ZANE WRIGHT;)	2:11-CV-01575-LRH-GWF
KAREN REIGER; and MIKE REIGER,)	
)	
Plaintiffs,)	
)	<u>ORDER</u>
v.)	
)	
WATKINS AND SHEPARD TRUCKING,)	
INC., a Montana corporation; GREGORY)	
ANDREW BRITT, an individual; DOES 1)	
through 5 and ROES 1 through 5,)	
)	
Defendants.)	
_____)	

Before the Court is Defendants Watkins and Shepard Trucking, Inc. (“Watkins & Shepard”) and Gregory Andrew Britt’s (“Britt”) Motion for Reconsideration, or in the alternative, Motion to Certify Question of Law to the Nevada Supreme Court. Doc. #72.¹ Also before the Court is Defendants’ Ex Parte Motion to Shorten Time for Briefing and Decision on the aforementioned Motion. Doc. #73.

I. Factual Background

This is a personal injury action arising out of a tractor trailer truck accident on June 5, 2011, in which Plaintiff pedestrians sustained severe injuries. Plaintiffs allege claims of negligence,

¹ Refers to the Court’s docket number.

1 negligent infliction of emotional distress, and negligent hiring and supervision against
2 employee/driver Britt and employer Watkins & Shepard. On December 10, 2012, Defendants filed
3 a Motion for Partial Summary Judgment (Doc. #38), seeking dismissal of Plaintiffs' claims against
4 Watkins & Shepard for negligent hiring and supervision. On May 16, 2013, the Court reopened
5 discovery in response to an anonymous letter Plaintiffs received regarding Watkins & Shepard's
6 hiring practices. *See* Doc. #59. On that basis, the Court denied Defendants' Partial Motion for
7 Summary Judgment without prejudice. *See* Doc. #69. On October 4, 2013, Defendants filed the
8 present Motions before the Court.

9 **II. Legal Standard**

10 Pursuant to Federal Rule of Civil Procedure 54(b), the Court has authority to reconsider,
11 modify, alter, or revoke any order adjudicating fewer than all the claims in an action at any time
12 before the entry of final judgment. *See United States Aviation Underwriters, Inc. v. WesAir, LLC*,
13 No. 2:08-CV-00891-PMP-LRL, 2010 U.S. Dist. LEXIS 35648, at *4 (D. Nev. April 12, 2010); *see*
14 *also United States v. Martin*, 226 F.3d 1042, 1048-49 (9th Cir. 2000). "Reconsideration is
15 appropriate if the district court (1) is presented with newly discovered evidence, (2) committed
16 clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in
17 controlling law." *Aviation Underwriters*, 2010 U.S. Dist. LEXIS, at *4 (quoting *Sch. Dist. No. 1J*
18 *v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)) (internal quotation marks omitted). However,
19 "[a] motion for reconsideration is *not* an avenue to re-litigate the same issues and arguments upon
20 which the court already has ruled." *Id.* (quoting *In re AgriBioTech, Inc.*, 319 B.R. 207, 209 (D.
21 Nev. 2004)) (internal quotation marks omitted) (emphasis added).

22 **III. Discussion**

23 The Court finds that reconsideration of its September 13, 2013 Order (Doc. #69) is not
24 warranted. The Court's Order was not clearly erroneous under controlling Nevada law, nor has
25 there been an intervening change of law such that the Court would reach a different conclusion. To
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1 the contrary, the Court's opinion as to Plaintiffs' cause of action against Watkins & Shepard for
2 negligent hiring and supervision appears to be exactly in line with what Defendants refer to as the
3 "majority" position in Nevada and the rest of the country for that matter. Moreover, Defendants
4 have presented no new evidence since the September 13, 2013 Order was issued. The Court
5 reopened discovery on the very issue of negligent hiring and supervision in order to give Plaintiffs
6 an opportunity to produce evidence relevant to punitive damages on that claim. *See* Doc. #59.
7 Should the evidence reveal that Plaintiffs' claim of negligent hiring and supervision is without
8 merit, the Court invites Defendants to resubmit their Motion for Partial Summary Judgment on this
9 claim. Until that time, the Court finds that no other changed circumstances would render this issue
10 appropriate for reconsideration and no manifest injustice would otherwise fall upon Defendants.

11 To the extent the Court's Order was unclear as to Plaintiffs' claim for negligent hiring and
12 supervision as it relates to punitive damages or "predicted" that the Nevada Supreme Court would
13 not adopt the "majority" position, the Court modifies its September 13, 2013 Order as set forth
14 herein. The Court agrees with Defendants and the apparent "majority" that Plaintiffs may not
15 maintain a direct cause of action for negligent hiring and supervision where it would impose no
16 additional liability on Defendants because Watkins & Shepard has already admitted vicarious
17 liability. Indeed, in those circumstances, Plaintiffs claim for negligent hiring and supervision
18 would merely be an alternative theory on which to recover against Watkins & Shepard for Britt's
19 alleged negligence, and thus entirely superfluous. As such, the Court finds it unnecessary to
20 expound further on this general principle.

21 However, this is not a case in which the "majority" rule can be mechanically applied to
22 dispose of Plaintiffs' claim for negligent hiring and supervision. In this regard, Defendants miss
23 the mark entirely. Here, there is not "only one element of damages that Plaintiffs may recover" for
24 which "Watkins & Shepard has admitted all the elements necessary to establish its complete
25 liability." *See* Doc. #72, p. 12. Nor does Plaintiffs' "direct negligence claim therefore [serve] no
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1 purpose” as Defendants urge. *See* Doc. #72, p. 15. Rather, Plaintiffs’ direct negligence claim
 2 against Watkins & Shepard for negligent hiring and supervision stands to impose liability *beyond*
 3 that which is available on the underlying derivative negligence claim. Thus, it merits full
 4 consideration separate and apart from Watkins & Shepard’s vicarious liability for Britt’s negligence
 5 to determine whether Plaintiffs’ request for punitive damages is viable.

6 Defendants cite to *Olivarez v. Rebel Oil Co., Inc.*, Case No. A430209 (Nev. Dec. 30, 2002),
 7 in the Eighth Judicial District of Nevada for the proposition that the trend in Nevada appears to be
 8 in line with the “majority” approach. Doc. #72, Ex. 1. The Court agrees. However, Defendants
 9 neglected to reference the portion of that order which is directly relevant to this case. Specifically,
 10 the court stated that “the exception to the general rule where a plaintiff has a claim for punitive
 11 damages against the employer based on its independent negligence in hiring and retaining the
 12 employee is not applicable, because the Court has dismissed Plaintiffs’ punitive damages claim
 13 pursuant to NRS 41.085(5).” *Id.*² Although inapplicable on other grounds, the Nevada court
 14 acknowledged precisely the exception on which this Court based its denial of Defendants’ Motion
 15 for Partial Summary Judgment. Similarly, Defendants cite *Adele v. Dunn*, No. 2:12-CV-00597-
 16 LDG-PAL, 2013 U.S. Dist. LEXIS 44602 (D. Nev. March 27, 2013), in which Judge George
 17 predicted that Nevada would adopt the “majority” position. Again, however, this case is
 18 distinguishable because it dealt with a situation in which “the direct claim of negligent entrustment,
 19 or negligent training, serve[d] only as [an] alternative theor[y] by which to impute liability to an
 20 employer for the acts of the employee.” *Id.*, at *5. Here, Plaintiffs’ direct claim against Watkins &
 21 Shepard does not rest solely upon Britt’s alleged negligent conduct. Rather, Watkins & Shepard
 22 faces additional liability beyond that imputed to it by virtue of Britt’s negligence. *Perez v. Kriegh*,

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 24 ² Nevada Revised Statute 41.085(5) provides, in relevant part, “[t]he damages recoverable by
 25 the personal representatives of a decedent on behalf of the decedent’s estate include . . . [a]ny penalties,
 26 including, but not limited to, exemplary or punitive damages, that the decedent would have recovered
 if the decedent had lived . . .”

1 Case No. A516240 (Nev. Mar. 6, 2008), is similarly inapposite as punitive damages were not at
2 issue.³

3 To ensure that Defendants are entirely clear on the Court's agreement with the weight of
4 authority on this issue, the Court has reproduced the relevant section of *Cruz v. Durbin*, on which
5 Defendants rely:

6 The purpose of the *McHaffie* rule is to prevent unnecessary litigation over claims that
7 have become redundant due to a factual admission by one party and to avoid the
8 admission of irrelevant, prejudicial material. The purpose of the rule is not furthered
9 by dismissing an allegedly redundant claim . . . where liability on the allegedly
10 redundant claim would support an additional measure of damages that liability on the
11 other claim alone would not support. The *McHaffie* court itself noted that it was not
12 instituting an absolute rule, and that a case could present itself in the future where both
types of claim could proceed:

[I]t may be possible that an employer . . . may be held liable on a theory of negligence
that does not derive from and is not dependent on the negligence of an . . . employee.
In addition, it is also possible that an employer . . . may be liable for punitive damages
which would not be assessed against the employee.

13 No. 2:11-CV-00342-RCJ-LRL, 2011 U.S. Dist. LEXIS 51057, at *9-10 (D. Nev. May 11, 2011)
14 (citing *McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. 1995)) (internal citations omitted). The
15 court went on to say that “[i]f Plaintiff amended the AC to request punitive damages, . . . , the
16 outcome would be different, because an employer’s fault in hiring and training is different from an
17 employee’s fault in driving.” *Id.*, at *10-11 (citing NRS 42.005; *Wyeth v. Rowatt*, 244 P.3d 765,
18 783 (Nev. 2010)).

19 Defendants also cite a persuasive law review article on the subject that explicitly carves out
20 an exception to the “majority” rule for viable claims of punitive damages. *See* Doc. #72, at 6
21 (citing Richard A. Mincer, *The Viability of Direct Negligence Claims Against Motor Carriers in*
22 *the Face of an Admission of Respondeat Superior*, 10 Wyo. L. Rev. 229 (2010) (hereinafter “*The*
23 *Viability of Direct Negligence Claims*”). While Mincer warns that the punitive damages exception
24 is more theoretical than practical, he concedes that “even the theoretical deserves a court’s attention

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26 ³ Defendants reproduce *Perez* at Doc. #72, Ex. 1.

1 to determine whether or not the plaintiff's punitive damages claim is viable or should also be
2 dismissed." *Id.* at 263. Indeed, it may be rare that an employer's actions in hiring, training,
3 supervising, or retaining an employee are egregious enough to warrant punitive damages.
4 Nevertheless, the Court is simply not prepared to foreclose the possibility that Plaintiffs' claim has
5 merit without the appropriate factual analysis. Accordingly, Defendants' Motion to Reconsider is
6 denied.

7 As previously mentioned in its September 13, 2013 Order, the Court is cognizant of
8 Defendants' concern that the evidence used to establish direct liability for negligent hiring and
9 supervision, namely an employee's prior conduct amounting to negligence, may be misused by the
10 trier of fact to establish the employee's negligence on the occasion in question. Indeed, Judge Reed
11 acknowledged precisely this problem in *Grimes v. Combined Transp., Inc.*, Case No. 3:05-CV-
12 00461-ECR-RAM (D. Nev. Oct. 3, 2007), Doc. #92, p. 7-11. Nevertheless, *Grimes*, like every
13 other case Defendants cite, is distinguishable on the grounds that the plaintiffs' direct liability claim
14 added nothing to the case in terms of recovery and was thus unnecessary. *Id.*, p. 11. Should
15 Plaintiffs' present sufficient evidence to pursue an award of punitive damages against Watkins &
16 Shepard for negligent hiring and supervision, the Court is confident that it would be capable of
17 managing the complex evidentiary issues presented. In fact, in *The Viability of Direct Negligence*
18 *Claims*, Mincer suggests that "[where] the Plaintiff presents facts that support a claim for punitive
19 damages . . . , then the case should be bifurcated to ensure the defendant receives a fair trial on the
20 underlying negligence claim against the driver. If—and only if—the driver is found negligent
21 should the trial proceed to the second phase where the plaintiff is given a fair opportunity to present
22 the claim for punitive damages." *The Viability of Direct Negligence Claims*, at 263-64. The Court
23 will assuredly give heed to Mincer's suggestion in the event the parties reach trial on the issue of
24 punitive damages.

25 Finally, as the Court hopes to have made abundantly clear, the question this Court addressed
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1 in its September 13, 2013 Order (Doc. #69) is not presently before the Nevada Supreme Court.
2 Punitive damages are simply not at issue in *Plat v. Eighth Judicial District Court*.⁴ Accordingly,
3 the Court denies Defendants' Motion to Certify Question of Law to the Nevada Supreme Court.
4 The Court also denies Defendants' request to present this matter to the Court in oral argument.
5 Lastly, the Court denies as moot Defendants' Ex Parte Motion to Shorten Time for Briefing and
6 Decision on Motion to Reconsider or Certify Question of Law to the Nevada Supreme Court.

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8 IT IS THEREFORE ORDERED that Defendants' Motion to Reconsider or Certify Question
9 of Law to the Nevada Supreme Court (Doc. #72) is DENIED.

10 IT IS FURTHER ORDERED that Defendants' Ex Parte Motion to Shorten Time for
11 Briefing and Decision on Motion to Reconsider or Certify Question of Law to the Nevada Supreme
12 Court (Doc. #73) is DENIED.

13 IT IS SO ORDERED.

14 DATED this 10th day of October, 2013.

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18 LARRY R. HICKS
19 UNITED STATES DISTRICT JUDGE
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26 ⁴ Defendants reproduce the Petition for Writ of Mandamus in *Plat* at Doc. #72, Ex. 7.